

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
FRANCIS C. AND BEVERLY B. PAVLAK	:	DETERMINATION
	:	DTA NO. 813799
for Revision of Determinations or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period September 1, 1982	:	
through February 28, 1986.	:	

Petitioners, Francis C. and Beverly B. Pavlak, 65 Litchfield Road, Port Washington, New York 11050, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1982 through February 28, 1986.

On February 12, 1996 and February 22, 1996, respectively, petitioners, appearing pro se, and the Division of Taxation, appearing by Steven U. Teitelbaum, Esq. (Andrew S. Haber, Esq., of counsel) consented to have the controversy determined on submission without a hearing. All documentary evidence and briefs were due to be submitted by July 29, 1996, which date commenced the six-month period for issuance of a determination in this matter. After due consideration of the record, Brian L. Friedman, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether petitioners timely filed a petition for an administrative hearing with the former Tax Appeals Bureau which, by virtue thereof, would have conferred subject matter jurisdiction upon the former State Tax Commission (now the Division of Tax Appeals).

II. Whether the amount of any outstanding assessments against petitioners must be reduced by the amount claimed to have been withheld by petitioner Francis C. Pavlak's employer, pursuant to an income execution issued by the Division of Taxation, which withholding was never remitted to the Division of Taxation.

III. Whether the handling of the present matter by the Division of Taxation in an allegedly untimely and inappropriate manner resulted in excessive assessments of tax, interest and penalties which should be reduced or abated.

IV. Whether the Division of Taxation properly offset certain of petitioners' income tax refunds against outstanding assessments or whether all collection procedures should have been suspended by the Division's Problems Resolution Office.

FINDINGS OF FACT

1. Pursuant to a field audit of Port Washington Sporting Goods, Ltd. which commenced in March 1985, the Division of Taxation ("Division"), on May 23, 1986, issued a Statement of Proposed Audit Adjustment to that corporation asserting additional sales and use taxes due of \$39,800.85 for the period September 1, 1982 through February 28, 1986. Thereafter, the Division issued notices of determination and demands for payment of sales and use taxes due, dated August 20, 1986, to Francis C. Pavlak and Beverly B. Pavlak, as officers of the aforesaid corporation.¹ The notices assessed sales and use taxes in the amount of \$39,800.85, plus penalty and interest, for a total amount due of \$59,051.60 for the period September 1, 1982 through February 28, 1986.²

2. As proof that the notices of determination were issued to petitioners on August 20, 1986, the Division submitted the affidavits of Norman W. Ayers, Daniel B. LaFar and Thomas C. Paley along with copies of the notice of determination issued to petitioner Francis C. Pavlak and certified mail records (Postal Service Form 3877 and Division of Taxation Form AU-372.1).

The affidavit of Norman W. Ayers, Program Manager for the Field Audit Management Sales Tax Section (the "Section"), states that he has been employed by the Division since 1970

¹As part of its exhibits, the Division of Taxation submitted a copy of the notice of determination issued to petitioner Francis C. Pavlak. In its brief, the Division stated that, while it was unable to locate the notice of determination issued to petitioner Beverly B. Pavlak, it has provided proof of proper issuance of this notice.

²It should be noted that the notice of determination issued to Francis C. Pavlak and the documentary evidence relating to the mailing of this notice, and the notice issued to Beverly B. Pavlak, indicate that petitioners' names were incorrectly spelled "Paulak". However, petitioners do not contend nor is there any evidence which would indicate that the misspelling resulted in any harm or prejudice to petitioners.

and that he is familiar with the Section's mailing procedures as they existed in 1986. In August 1986, preparation of notices of determination for mailing was a regular duty of Section staff. The Section's clerks prepared the notices and a keyboard specialist prepared certified mail records. According to Mr. Ayers, the notice number for a notice of determination, abbreviated to the last four digits, was listed in the column labeled "insured value" on the Postal Service Form 3877.

In 1986 the notices of determination were placed in window envelopes so that the names and addresses on the notices could be seen. As part of his or her regular duties, a member of the Section's staff verified the names and addresses on the notices against the certified mail record and assigned a sequential certified control number to each envelope. On August 20, 1986, a staff member of the Section, Beth Deatherholtz, brought the envelopes containing all of the notices of determination listed on the certified mail record for that date, along with the certified mail record, to the Division's Mail and Supply Section and observed them being stamped. Attached to Mr. Ayer's affidavit, as Exhibit "3", is the attestation of Ms. Deatherholtz. Thomas C. Paley, an employee of the Mail and Supply Room, stated that, on August 20, 1986, he deposited all of the notices described on the certified mail record, all of which were enclosed in sealed postpaid envelopes, at a branch of the United States Postal Service in Albany, New York. Mr. Paley's attestation is also attached to the affidavit of Norman W. Ayers.

After the notices of determination were accepted by the post office, the mail room returned a copy of the certified mail record, with the U.S. Postal Service postmark affixed thereto indicating date of mailing, to the Sales Tax Field Office Management Office along with the attestation of the employee who deposited the notices at the post office. The certified mail record is kept in the regular course of business of the Section. Certified mail return receipts are not requested from the post office.

Mr. Ayers stated that the Division could not locate the original copies of the notices of determination at issue herein. Petitioner Francis C. Pavlak provided the Division with a copy of the notice issued to him; petitioner Beverly B. Pavlak did not.

Based upon his review of the copy of the notice issued to Mr. Pavlak, Postal Service Form 3877, and Division Form AU-372.1, coupled with his knowledge of the procedures and operations of the Section, Mr. Ayers stated that the notice issued to Francis C. Pavlak (Notice No. S860820193C) and the notice issued to Beverly B. Pavlak (Notice No. S860820194C) were properly sent by certified mail to these petitioners at 65 Litchfield Road, Port Washington, New York 11050 on August 20, 1986. Mr. Ayers further stated that, with the exception of the name, the associated vendor I.D. number and notice number, the notice of determination issued to Beverly B. Pavlak contained the same information as the notice issued to Francis C. Pavlak.

3. Daniel B. LaFar, Principal Mail and Supply Clerk, supervises the Division's Mail and Supply Room staff in delivering outgoing mail to branch offices of the United States Postal Service. After a notice is placed in the outgoing certified mail basket in the mail room, a member of the staff weighs and seals each envelope and places the postage and fee amount on the letter. A mail processing clerk counts the envelopes and verifies the names and certified mailing numbers against the information contained on the certified mail record.

Mr. LaFar stated that a member of his staff delivered the stamped envelopes to the Roessleville Branch of the United States Postal Service in Albany, New York on August 20, 1986. A Postal Service employee affixed a postmark to the certified mail record, wrote the total number of pieces received at the post office and initialed the certified mail record to indicate that this was the total number of pieces received. He indicated that the certified mail record is the Division's record of receipt by the Roessleville Branch for pieces of certified mail. In the ordinary course of business and pursuant to the practice and procedure of the Mail and Supply Room, the certified mail record is picked up at the post office on the following day and is then delivered to the originating office by a member of Mr. LaFar's staff.

Based upon his review of the affidavit of Norman W. Ayers and the exhibits attached thereto as well as the certified mail record, Mr. LaFar stated that he could determine that on August 20, 1986, a Mail and Supply Room employee delivered pieces of mail addressed to Francis C. Pavlak and Beverly B. Pavlak at 65 Litchfield Road, Port Washington, New York

11050 to the Roessleville Branch of the United States Postal Service in Albany, New York in sealed postpaid envelopes for delivery by certified mail. In addition, Mr. LaFar could determine that a member of his staff obtained a copy of the certified mail record, with the postmark stamped thereon, which was delivered to and accepted by the post office on August 20, 1986, for the records of the Field Audit Management Sales Tax Section of the Audit Division. The procedures described by Mr. LaFar were the regular procedures of the Mail and Supply Room and were followed on August 20, 1986 in mailing the pieces of certified mail at issue in this proceeding.

4. Thomas C. Paley, Mail and Supply Clerk, employed in the Division's Mail and Supply Room, stated that, as part of his duties, he delivers the outgoing mail to a branch of the United States Postal Service every morning and afternoon. As part of his performance of that function, he gives the certified mail to a Postal Service employee who counts the envelopes containing certified mail and checks that figure against the information contained on the certified mail record. The Postal Service employee then stamps the certified mail log with a postmark indicating the date on which the certified mail was received at the post office. Mr. Paley receives the certified mail record back from the post office on the following day.

Mr. Paley reviewed the certified mail record and the Form AU-372.1 for August 20, 1986 and, based upon these documents, he could determine that on August 20, 1986, he delivered certified mail addressed to Francis C. Pavlak and to Beverly B. Pavlak at 65 Litchfield Road, Port Washington, New York 11050 to the Roessleville Branch of the United States Postal Service. He stated that the procedures described in his affidavit are the regular procedures followed by the Mail and Supply Room in the ordinary course of business when delivering mail to the post office and that these procedures were followed on August 20, 1986.

5. The certified mail record (Postal Service Form 3877), attached to the affidavit of Norman W. Ayers, is a one-page document which lists 15 sequentially numbered articles. According to the form, two articles of mail were addressed to Port Washington Sporting Goods, Ltd. at 75 Main Street, Port Washington, New York 11050 and one article of mail each was

addressed to Francis C. Pavlak and Beverly B. Pavlak, as officers of Port Washington Sporting Goods, Ltd., at 65 Litchfield Road, Port Washington, New York 11050.³ The names and addresses of the other nine addressees were crossed out (presumably to preserve their confidentiality). The form contained a United States Postal Service postmark of August 20, 1986. At the bottom of the form, under "Total Number of Pieces Listed by Sender" is "15" and under "Total Number of Pieces Received at Post Office" is handwritten "fifteen". The initials "RE" appear beneath "POSTMASTER, PER (Name of receiving employee)". Under "Insured Value" are numbers for each of the 15 articles of mail. For petitioner Francis C. Pavlak, these numbers are 193C and 197C; for petitioner Beverly B. Pavlak, the numbers are 194C and 196C.

On the Form AU-372.1, the Division's mailing record for notices of determination dated August 20, 1986, which also was attached to Mr. Ayers's affidavit, is a listing of the notice numbers, identification numbers and total amounts of the notices of determination issued to each of these petitioners as well as to Port Washington Sporting Goods, Ltd. and other unidentified taxpayers. The mailing record indicates that notices of determination bearing notice numbers S860820193C and S860820197C, in the total amounts of \$59,051.60 and \$993.33, respectively, were issued to Francis C. Pavlak, officer, on August 20, 1986. It also indicates that notices of determination bearing notice numbers S860820194C and S860820196C, in the total amounts of \$59,051.60 and \$993.33, respectively, were issued to Beverly B. Pavlak, officer, on August 20, 1986.

6. On August 6, 1986, the corporation owned by petitioners, Port Washington Sporting Goods, Ltd., filed a bankruptcy petition (Chapter 7) in the U.S. Bankruptcy Court in Westbury, New York. The Division of Taxation was listed as a creditor on the petition.

³According to Division Form AU-372.1, in addition to the notices of determination at issue in this proceeding, on August 20, 1986, a notice of determination bearing notice number S860820197C, in the amount of \$993.33, was issued to petitioner Francis C. Pavlak and a notice of determination, notice number S860820196C, in the same amount, was issued to petitioner Beverly B. Pavlak. From an examination of the audit file, it appears that these assessments were for penalty only, for the period ended February 28, 1986. At a subsequent courtesy conference provided by the Division (the results of which shall hereinafter be discussed), these penalty assessments were reduced to \$233.74 and, upon recomputation of the total assessments due from these petitioners, were simply added to the penalty already due from them for this period. In the absence of evidence to the contrary, it shall be presumed these penalty assessments were not separately (or timely) protested by petitioners.

In their reply brief, petitioners state that upon receipt of the notices of determination, they immediately sent two letters to Tax Compliance, Albany, New York. Petitioners contend that these letters, dated August 22, 1986, were sent pursuant to the verbal instruction of the District Office. Copies of these letters are attached to the reply brief as Exhibit "26". The reply brief states that "[w]e did not at that time send a petition to the Tax Appeals Bureau because of the bankruptcy proceedings and the aforementioned letters of protest. And in view of the fact that all collection action should be 'stayed' during the bankruptcy proceedings."

7. In September 1987, the attorney for petitioners (John A. Dowd, Esq.) requested a courtesy conference with the Division's Nassau District Office. This request was subsequently granted by letter dated September 21, 1987. It should be noted that, in the initial paragraph of the letter, it states that "although you have lost your appeal rights through the normal hearing process, I am granting you a courtesy conference." This letter was sent to John A. Dowd, Esq. who, presumably, was then representing petitioners. As a result of the courtesy conference, the assessments against the corporation (and, accordingly, against petitioners) were reduced from \$39,800.85 to \$14,820.53, plus penalty and interest. A report from Stephen Spector, Tax Auditor I, dated January 12, 1989 sets forth the basis for the reduction. At the bottom of this report is a handwritten notation indicating that the vendor had agreed to the recomputation of the tax liability.

8. Prior to the recomputations, on January 5, 1987, warrants were filed with the Nassau County Clerk against petitioners.

An income execution, dated March 10, 1987, was served upon petitioner Francis C. Pavlak. Upon Mr. Pavlak's failure to comply with its provisions, an income execution was served upon his then employer, Walter J. Black, Inc. of Roslyn, New York. These income executions indicated thereon that the amount of \$62,059.31 was due from petitioner Francis C. Pavlak. On February 6, 1991, another income execution was served upon Walter J. Black, Inc. This income execution stated that the sum of \$33,993.89 was due as of December 26, 1990.

9. According to a letter to Mr. Pavlak from the Division's Tax Compliance Division on December 1, 1993, the Division had received, as of that date, payments totaling \$11,064.53. Of this amount, \$7,134.36 was received from the bankruptcy proceeding, \$850.00 from an offset from a 1992 income tax refund and \$3,080.17 from payments by Walter J. Black, Inc. pursuant to the income executions.

Apparently, Walter J. Black, Inc., pursuant to the income execution served upon it, began withholding the sum of \$123.00 on a biweekly basis from petitioner Francis C. Pavlak's wages. However, the employer failed to remit to the Division the sum of \$12,423.00, representing 101 pay periods between February 28, 1987 and January 15, 1991, and the sum of \$4,182.00, representing 34 pay periods between June 1, 1992 and September 30, 1993. As a result, the State of New York obtained an order and judgment against Walter J. Black, Inc., in the amount of \$16,605.00, plus interest, on July 19, 1994. The Division has collected no money on the judgment against Walter J. Black, Inc.

10. Income executions were also issued by the Division against petitioner Beverly B. Pavlak. Payment in the amount of \$581.54 was received prior to the withdrawal of the income execution in October 1994.

11. On May 15, 1995, the Division of Tax Appeals received a petition from petitioners. It was signed by both petitioners and was dated May 5, 1995.

12. The April 2, 1996 affidavit of Theodore Eckler, Tax Compliance Agent II, indicates that, as of April 1, 1996, there remained due and owing the sum of \$35,239.69, consisting of \$8,802.34 tax, \$2,566.78 penalty and \$23,870.57 interest. The affidavit sets forth the sources and amounts of all payments made on these assessments.

13. Petitioners have submitted voluminous documentation relating to their dealings with the Division from the time of the issuance of the notices of determination up to and through the various collection procedures utilized by the Division. Chronological logs of telephone calls as well as copies of letters between the parties have also been made a part of the

documentation submitted by petitioners.

CONCLUSIONS OF LAW

A. Before examining the issue of whether petitioners timely filed a petition seeking an administrative hearing, it must be noted that the statutory notices which gave rise to this proceeding were issued on August 20, 1986, a time which was prior to the creation of the Division of Tax Appeals. Chapter 282 of the Laws of 1986, among other things, created the Division of Tax Appeals, effective September 1, 1987. Therefore, while it is essential to examine the statutes and regulations concerning issuance of notices of determination and taxpayer protest rights which were in effect in August 1986, it is also necessary to refer to current law for guidance. That is true because what petitioners now seek is administrative review, by the Division of Tax Appeals, of the assessments issued by the Division of Taxation as well as certain procedures of enforcement and collection employed by the said Division of Taxation.

B. During the period at issue in this proceeding, i.e., prior to the creation of the Division of Tax Appeals on September 1, 1987, Tax Law § 1138 (former [a]) provided, in relevant part, that a notice of determination of tax due was required to be given to the person liable for the collection or payment of the tax and that such determination would finally and irrevocably fix the tax unless the person against whom it was assessed, within 90 days after giving notice of such determination, applied to the former State Tax Commission for a hearing or unless the Tax Commission, on its own motion, redetermined the tax due.

C. Tax Law § 1147(a)(1) provides that a notice of determination shall be mailed promptly by registered or certified mail and that any period of time which is determined according to the provisions of Article 28 of the Tax Law by the giving of notice shall commence to run from the date of mailing of such notice.

D. 20 NYCRR former 601.3(a) provided that "[a]ll proceedings before the Commission must be commenced by the filing of a petition with the operating bureau involved in the controversy."

20 NYCRR former 601.3(c) stated that "[t]he petition must be filed within the time limitations prescribed by the applicable statutory sections, and there can be no extension of that time limitation." It is clear, therefore, that pursuant to the provisions of Tax Law § 1138(former [a]), a petition was required to be filed within 90 days from the date of issuance of the notices of determination.

E. As pertains to current law, i.e., to requesting a hearing before the Division of Tax Appeals, Tax Law § 2008 provides, in part, as follows:

"[a]ll proceedings in the division of tax appeals shall be commenced by the filing of a petition with the division of tax appeals protesting any written notice of the division of taxation which has advised the petitioner of a tax deficiency . . . or any other notice which gives a person the right to a hearing in the division of tax appeals under this chapter or other law."

F. If a taxpayer fails to file a petition protesting the statutory notice, the Division of Tax Appeals is precluded from hearing the case, having no jurisdiction over the matter (see, Matter of Roland, Tax Appeals Tribunal, February 22, 1996; Matter of Sak Smoke Shop, Tax Appeals Tribunal, January 6, 1989).

G. Where the taxpayer files a petition, but the timeliness of the petition is at issue, the Division has the burden of proving proper mailing of the statutory notice in question (see, T.J. Gulf, Inc. v. State Tax Commn., 124 AD2d 314, 508 NYS2d 97; Matter of Katz, Tax Appeals Tribunal, November 14, 1991; Matter of Novar TV & Air Conditioner Sales & Serv., Tax Appeals Tribunal, May 23, 1991). A notice is mailed when it is delivered to the custody of the United States Postal Service (Matter of Air Flex Custom Furniture, Tax Appeals Tribunal, November 25, 1992).

H. If the notice is properly mailed by the Division, there is a presumption of receipt by the person to whom it was addressed (Engel v. Lichterman, 95 AD2d 536, 467 NYS2d 642, 643, affd 62 NY2d 943, 479 NYS2d 188). The petitioner then has the right to rebut this presumption (see, Matter of Ruggerite, Inc. v. State Tax Commn., 64 NY2d 688, 485 NYS2d 517, 518).

I. The mailing evidence required of the Division is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of notices by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in the particular instance in question (see, Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra). A properly completed Postal Form 3877, reflecting Postal Service receipt of the items listed on the form, represents direct documentary evidence of the date and fact of mailing (Matter of Air Flex Custom Furniture, supra; see also, Coleman v. Commr., 94 TC 82; Wheat v. Commr., 63 TCM [CCH] 2955). The United States Tax Court has held that "precise compliance" with the Postal Service Form 3877 mailing procedures serves two purposes in addition to providing direct evidence of mailing: (1) "A properly completed postal service Form 3877 also reflects compliance with IRS established procedures for mailing deficiency notices" and (2) the properly completed form raises a presumption of official regularity (Wheat v. Commr., supra, 63 TCM [CCH] at 2958, and cases cited therein). If the Division elects not to use a properly completed Postal Service Form 3877 as its direct evidence of mailing, it is required to provide evidence otherwise sufficient to prove both the fact and date of mailing (Matter of Green Valley Liquors, Tax Appeals Tribunal, November 25, 1992).

Thus, even in a case such as this one, where petitioners do not contest the date of mailing of the notices of determination, when the timeliness of a petition is at issue, the Division must, nevertheless, come forward with sufficient proof of mailing.

J. In the present matter, the Division has introduced, via the affidavits of three of its employees, Norman W. Ayers, Daniel B. LaFar and Thomas C. Paley (see, Findings of Fact "2", "3" and "4"), adequate proof of its standard mailing procedures in mailing notices of determination. The affidavits describe, in some detail, the various procedures employed in the generation of the notices and the Division's certified mail records, the verification of the accuracy of the information contained thereon and the process of mailing the notices.

Second, the Division has established that the general issuance procedures were followed on August 20, 1986. The Postal Service Form 3877 attached to Mr. Ayers's affidavit is a one-page document listing 15 entries, 6 of which pertain to the present matter (2 notices were listed as having been issued to the corporation, 2 to petitioner Francis C. Pavlak and 2 to petitioner Beverly B. Pavlak). The certified mail number of the articles and the notice numbers (the last three numbers of the notice numbers are listed under the column for "insured value") assigned to each, run consecutively on the form. The "Total Number of Pieces Listed by Sender" and "Total Number of Pieces Received at Post Office" have been filled in with "15" and "fifteen", respectively. The form contains the initials of the Postal Service employee who received the articles and also contains a United States Postal Service postmark of August 20, 1986.

The Division's mailing record, Form AU-372.1, for August 20, 1986, also lists all six of the notices relating to the present matter. The notice numbers match the numbers of the notices issued to these petitioners, the identification number (11-2627962) matches the number listed on the notice issued to petitioner Francis C. Pavlak as does the total amount of the assessment (\$59,051.60). In conclusion, the proof offered by the Division substantiates its claim that the notices were issued, by certified mail, to petitioners on August 20, 1986.

K. In reaching the above conclusion, it is duly noted that the Division was unable to produce a copy of the actual notice of determination which was issued to petitioner Beverly B. Pavlak. However, based upon the content of the letters (see, Finding of Fact "6"), it is clear that both petitioners received the notices in question (the notice numbers are cited in the letters) and that they were received on or before August 22, 1986 which is consistent with an issuance date of August 20, 1986. At no time have petitioners ever alleged that the notices of determination were not properly issued nor have they denied receipt thereof. Accordingly, it is hereby determined that the notices of determination were properly issued to these petitioners by the Division on August 20, 1986, and the 90-day period for filing a petition seeking administrative review thereof commenced to run from that date.

L. Petitioners contend that the letters sent to Tax Compliance (see, Finding of Fact "6"), in response to the Division's issuance of the notices of determination, were sent pursuant to the verbal instruction of the Nassau District Office. Yet, in their reply brief, they state that they did not send a petition to the former Tax Appeals Bureau because of the pending bankruptcy proceedings and the August 22, 1986 letters of protest. The decision, by petitioners, not to file a petition with the Tax Appeals Bureau appears to have been a conscious choice which, apparently, was based upon certain misconceptions.

In the upper left-hand corner of the notice of determination (see, Division's Exhibit "E"), the Division set forth the procedure and the time period for challenging its determination of tax due. Petitioners failed to comply with these instructions. In addition, as early as September 21, 1987, they were advised that they had lost their appeal rights through the then existing administrative process (see, Finding of Fact "7"), yet there is no evidence of any attempt to protest such loss or to regain such rights. In Matter of Stone (Tax Appeals Tribunal, August 25, 1994), the Tribunal affirmed the opinion of the Administrative Law Judge who, citing Matter of Friedman (Tax Appeals Tribunal, December 8, 1988) and Matter of Matson (Tax Appeals Tribunal, March 10, 1988), held that the Division does not have to go behind the statutory notice to explain its basis and, furthermore, that there is no provision in the Tax Law that would toll the statutory period in order for an inquiry to be made into the purpose and/or basis of the assessment. The Administrative Law Judge stated (and this was affirmed by the Tribunal) that the existence of such a provision would render meaningless the 90-day rule and would obviate the entire purpose of having such a statutory time limit. As stated by the Tribunal in Matter of Lehal Realty Associates (Tax Appeals Tribunal, May 18, 1995), the purpose of the petition is to confer jurisdiction on the administrative body to hear the matter that the taxpayer seeks to address. It is, therefore, necessary for the taxpayer to provide some manner of notice to the Division of Tax Appeals (or, in the case of these petitioners, to the former State Tax Commission) within the prescribed period so as to preserve a claim.

As to the bankruptcy proceeding instituted by Port Washington Sporting Goods, Inc., it is well-settled that a corporation's bankruptcy has no relevance to the personal liability of a person required to collect and remit the tax (Matter of Kadish, Tax Appeals Tribunal, November 15, 1990). The liability of a responsible officer is separate and independent from that of the corporation (Matter of Yellin v. New York State Tax Commn., 81 AD2d 196, 440 NYS2d 382).

It must be found, therefore, that petitioners failed to timely file a petition for administrative review of the Division of Taxation's issuance of the assessments at issue. In all of the documentation submitted by petitioners, the underlying theme is an apparent failure to understand (or to agree with) the Division's assessments. It is unfortunate that petitioners failed to avail themselves of their rights to an administrative hearing at which each party would have had the opportunity to present evidence as to the basis and reasonableness of the assessments. It is additionally unfortunate that petitioners have expended so much time and energy challenging enforcement proceedings instituted by the Division after the assessments became fixed.⁴ However, due to the fact that petitioners failed to file a timely petition with the former Tax Appeals Bureau within the requisite 90-day period, the Division of Tax Appeals is without jurisdiction to consider the substantive issues (Issues "II" through "IV" herein) advanced by petitioners.

M. The petition of Francis C. Pavlak and Beverly B. Pavlak is dismissed.

DATED: Troy, New York
January 23, 1997

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE

⁴It must be noted herein that the Division of Tax Appeals has no authority to suspend collection activities against petitioners (see, Matter of Driscoll, Tax Appeals Tribunal, April 11, 1991).